

**THREE MEMBER DUE PROCESS HEARING PANEL
EMPOWERED PURSUANT TO 162.961 R.S.MO.**

HEARING DECISION

Student's Name:

Parents' Name:

Parents' Attorney:

**Missouri Protection and Advocacy Services
Mr. Ernest G. Trakas
Deputy Managing Attorney
2941 S. Brentwood Blvd.
Brentwood, MO 63144
(314) 961-0679**

Local Education Agency:

**Centralia R-VI School District
635 S. Jefferson
Centralia, MO 65240-1625**

School District's Attorney:

**Ms. Teri B. Goldman
Attorney at Law
36 Four Seasons Center, #136
Chesterfield, MO 63017
(314) 628-9755**

Hearing Dates:

**October 7 – 11, 2002
Centralia, Missouri**

Date of Decision:

December 13, 2002

Hearing Officers:

**Patrick O. Boyle, Chairman,
Mr. Rand Hodgson, and
Mr. George Wilson**

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Hearing Decision

Issue

Parents disagree with the student's placement at the State School for the Severely Handicapped (S.S.H.) and, they contend that the Local Education Agency's (L.E.A.) placement with the S.S.H. was improper under State procedures.

The parents further contend that student's placement with the S.S.H. is not appropriate and will not be sufficient to meet the needs and maximize the capabilities of the student as required by 162.670 R.S.Mo. in effect at the time of placement with the S.S.H.

Time Line

Parents' request for a due process hearing was received by the Missouri Department of Elementary and Secondary Education (DESE) on July 23, 2002.

On August 6, 2002 the panel Chair received a request from the LEA that the time for decision be extended. LEA's request was granted by the Chair on August 20, 2002 and, the time for decision was extended to December 2, 2002. A hearing was set for the week of October 7, 2002.

Hearing was held at the LEA offices from October 7, 2002 to October 11, 2002. The parties consented to an extension of time for filing briefs and, the Chair entered an Order on October 14, 2002 extending the time for decision to December 13, 2002 and, allowing the parties time until November 12, 2002 to file suggested Findings of Fact and Conclusions of Law.

Findings of Fact

1. Student was born on. Ex. R-1 at 4; Tr. 111. During pregnancy, the parent had complications due to the death of a twin at 14 weeks. Id.; Tr. 186.
2. On or about February 23, 1996, Student was medically diagnosed with cerebral palsy. Ex. R-1 at 4.
3. On or about March 4, 1996, Student's doctor performed a CAT scan that was "devastatingly abnormal." Id. The physician's conclusion was that student had no occipital brain and that part of the parietal brain on each side also was missing. Id. The physician indicated that, as a result of those findings, she anticipated that student would be profoundly mentally retarded. Id. at 5; Tr. 187.
4. In March 1996, student was enrolled in the First Steps program through which he received occupational, physical, speech and developmental therapies. Ex. R-1 at 5.
5. On or about May 14, 1996, after an MRI, student was diagnosed with schizencephaly. Id. On or about May 31, 1996, student was hospitalized for placement of a shunt to divert fluid collection in the brain. While in intensive care, he suffered a seizure. Student continued to take medication for seizures until March 31, 1998. Id.; Tr. 187.
6. Following placement of the shunt, an additional CAT scan showed that student's brain was atrophic in size. Ex. R-1 at 5.

7. LEA is a public school district located in Missouri and is organized under the statutes of Missouri. There is one elementary school within the LEA and approximately 500 children attend there. Tr. 596. The Elementary School has two special education teachers. One teaches children with learning disabilities in a resource room. Tr. 596. The other has a multi-categorical classroom that provides services to children with learning and behavioral disabilities and, on occasion, mild mental retardation. Tr. 597.

8. The LEA also operates an early childhood special education (“ECSE”) program that is housed in the “School House”. Tr. 349. The School House is a home that was purchased by the LEA and is located directly across from the elementary school. Tr. 129-30, 349. The LEA has one early childhood special education teacher and she has provided instruction in the ECSE program for approximately 15 years. TR. 347. This teacher has a bachelors and master’s degrees in early childhood special education and is certified by the State of Missouri to teach early childhood special education from ages 3 through 8. Tr. 348. However, the teacher’s contract with the LEA authorizes her only to teach children aged 3-5 in the LEA’s early childhood special education program. The teacher also is certified by the State of Missouri to instruct children with severe and profound disabilities. Tr. 348.

9. The LEA’s ECSE program typically serves 12-16 children during each school year. Tr. 349. During the 2001-02 school year, 17 children were served in the ECSE program. Tr. 353. The program offers one-half day sessions. The morning session

operates from 8:30 to 11:30 and the afternoon program runs from 12:10 to 3:10. Tr. 349-50, 621. Although the teacher is certified by the state to serve children up through age 8, the ECSE program only services children through age 5 or when they become eligible for kindergarten. Tr. 352-53. The teacher has a full-time paraprofessional available to assist her in the ECSE program. Tr. 354.

10. In addition to early childhood special education, the LEA offers speech-language, occupational and physical therapies through the School House program. Tr. 349. Physical and occupational therapies are offered as contracted services and are only available on Tuesday and Thursday mornings through the contracted providers. Tr. 350. There is one contracted physical therapist and one contracted occupational therapist. Tr. 350-51. The contract therapists provide such services to all children in the LEA who require them. Tr. 351. The LEA does not have a separate therapy room available in the School House or within the elementary school. Tr. 352. In ECSE, occupational and physical therapies are provided in the same space in which the general program operates. Tr. 352. There is an LEA full-time speech-language therapist. Tr. 351. She also provides therapy to all students within the LEA who have such needs, not just to ESCE children. Tr. 351-52. In the School House, the speech-language therapist is able to provide therapy in a separate space. Tr.

11. The ECSE program utilizes a curriculum that is similar to a typical pre-school program and includes academic instruction. Tr. 355-56.

12. At the time of hearing, student was a six-year-old male student, (Tr. 110) who resided with his parents, and his siblings in the LEA. If student was not disabled, he would attend the elementary school within the LEA.

13. On or about March 24, 1998, the LEA and student's First Steps providers held a transition meeting. Ex. R-1 at 6. At that meeting, the individuals present agreed that student's First Steps providers would complete assessments and progress reports for student and release those to the LEA for purposes of an IDEA referral. Ex. R-1 at 6; Tr. 356-57.

14. On or about April 20, 1998, student was hospitalized for orthopaedic surgery. Ex. R-1 at 6.

15. On or about September 18, 1998, student was referred to the LEA to determine his eligibility under the Individuals with Disabilities Education Act. Ex. R-1; Tr. 356-58.

16. On or about October 12, 1998, the LEA prepared a diagnostic summary to report the results of student's initial educational evaluation. Ex. R-1 at 4. At that time, the LEA relied on the outside testing completed through the First Steps program and other outside entities and did not conduct its own testing. Tr. 360-63. The screening that occurred prior to evaluation showed that, at that time, student's general health was good. Ex. R-1 at 6. Student's multidisciplinary team concluded that he was eligible for special education pursuant to the IDEA due to delays in health/motor and communication based on the assessments completed by the private agencies that previously worked with him. Ex. R-1 at 13-14.

17. On or about October 12, 1998, student's IEP team met to prepare his initial IEP. Ex. R-1 at 15; Tr. 358. The initial IEP calls for a total of 540 minutes per week in special education and 180 minutes per week in the related services of occupational, physical, and speech-language therapies. Id. The IEP provides for goals and objectives in the areas of school readiness, physical therapy, occupational therapy, and speech-language. Ex. R-1 at 15-23.

18. Parent provided consent for student's initial placement in special education pursuant to the October 12 IEP on or about October 20, 1998. Ex. R-1 at 26.

19. Student began receiving early childhood special education services through the LEA in late October 20, 1998, at the School House. Tr. III. He attended four mornings per week. Tr. 372. During the three years that student attended the ECSE program, his placement and minutes in services did not change. Tr. 621. Student was able to tolerate the frequency and duration of the program. Tr. 373, 621. The LEA provided transportation to the program from student's home, first by car seat and later by wheelchair. Tr. 370-71; Ex. R-56 at 58.

20. While enrolled in the ECSE program, student's ability level was significantly lower than the other special education children, aged 3-5, who participated in the program. Tr. 379, 621-22. He was not able to stand and was not mobile. Tr. 367. Moreover, he was not able to independently participate in any activities. Tr. 378. However, with a paraprofessional's support and with manipulation, he could hold and release objects. Tr. 368. Student was able to make eye contact, turn his head in response

to noise and engage in some infant babbling. Tr. 368. He also responded to peers by smiling. Tr. 376. He had no intelligible speech for communication, Tr. 377, and, during the three years that student attended ECSE, the staff was never able to find a modality by which student could successfully communicate. Tr. 623.

21. During the three years that student attended the ECSE program, his general health and attendance were good. Tr. 369. Although he experienced one seizure during that time frame, that seizure did not occur at school. Tr. 369-70. During the three years, the LEA was not informed by the parents or student's treating physicians of any medical or motor restrictions that needed to be in place. Tr. 371.

22. During the three years that student attended, his muscle tone frequently was an issue and tended to dictate his schedule for the day. Tr. 371-72, 622. The tone became less of an issue after student was surgically implanted with a baclofen pump to reduce his tone. Tr. 372. When student's tone or fatigue was an issue, student was able to nap within the ECSE setting and ECSE staff was able to provide flexible scheduling for his services. Tr. 371, 621.

23. The ECSE special education teacher worked with student to reinforce student's speech-language, occupational and physical therapy goals and also worked with him on more educational issues. Tr. 365. Her main focus during the 1998-99 school year was simply to get student through the morning routine. Tr. 365. At that time, she had no information regarding his cognitive abilities. Tr. 368. Student participated in the ECSE curriculum with the support of a paraprofessional and with adaptations. Tr. 367, 622.

During student's time in ECSE, the teacher believed that he enjoyed being around the other children by observing his smiles in reaction to their presence. Tr. 622. Although he spent part of his day with the other children, he required a great deal of 1:1 instruction. Tr. 216.

24. During the 1998-99 school year, student made progress with respect to the goals and objectives that special education teacher implemented. Tr. 379-83. However, because of the severity of his disabilities, that progress was slow. Tr. 382-83. In the teacher's opinion, student received educational benefit during that school year.

25. On or about December 18, 1998, student's IEP team prepared an evaluation plan to assess him in the areas of cognition and academics. Ex. R-2 at 27. The team agreed to conduct this additional evaluation because the LEA had not received all the information from student's home therapist that was necessary and requested. Tr. 384. Parent provided written consent for the evaluation on or about January 5, 1999. Ex. R-2 at 28. The LEA received additional outside information as part of that reevaluation process. Tr. 387.

26. On or about February 22, 1999, student's team met to prepare a diagnostic summary to reflect the results of that reevaluation. Ex. R-4 at 31. After reviewing the information obtained, the team concluded that student continued to meet the criteria to be eligible for special education. Id. at 33. Parent participated in the meeting. Id.

27. On or about May 10, 1999, student's IEP team met to prepare an IEP for the 1999-2000 school year. Ex. R-5; Tr. 112. That IEP continued student's placement in the

ECSE program. Ex. R-5 at 34.; Tr.112. That IEP includes goals and objectives in school readiness, occupational and physical therapy, and speech-language. Ex. R-5 at 36-43. Parent agreed with the content of the IEP, including the goals and objectives. Tr. 112-14. At hearing, parent testified that, in her opinion, student made progress with respect to those goals and objectives and she was satisfied with the amount of progress. Tr. 113-16. The progress reports prepared by student's teachers and therapists demonstrated that he did make progress with regard to many of his goals and objectives. Ex. R-6 at 46-55.

28. During the summer of 1999, student received extended school year services. Tr. 384.

29. In or about August 1999, student had an appointment with Dr. Wright, one of his treating physicians. Ex. R-30 at 377. Dr. Wright's report indicates that, at that time, student had no problems with dysphagia "nor resultant pneumonia, asthma, or bronchitis." Ex. R-30 at 377.

30. In or about November 1999, Dr. Patel, another of student's physicians, surgically inserted a baclofen pump in student to reduce the spasticity in his lower extremities. Ex. R-30 at 380-81. After surgery, student had no difficulty with eating, drinking or swallowing. Ex. R-30 at 380. The pump improved the spasticity in student's lower extremities.

31. In or about November 1999, Dr. Fleischer, one of student's treating physicians, noted that with the exception of student's hospitalizations for a shunt placement in May 1996 and a seizure in February 1999, student had no further

hospitalizations. Ex. R-30 at 383-85. Dr. Fleischer's medical report noted that, at that time, student spent his days with a babysitter. Ex. R-30 at 384.

32. The progress reports prepared with respect to the May 10, 1999 IEP show that student made progress on many of his IEP goals and objectives. Ex. R-8 at 71-97.

33. On or about May 8, 2000, student's IEP team convened to prepare an IEP for the 2000-01 school year. Ex. R-7 at 56; Tr. 117. The IEP continued student's placement in the ECSE program. Ex. R-7 at 56. The IEP included goals and objectives in the areas of readiness, occupational and physical therapy, and speech-language. Ex. R-56 at 60-69. The goals and objectives for student in that IEP were similar to those included in his previous IEPs. See Ex. R-7 at 56; Tr. 118-21. In parent's opinion, student made progress with respect to those goals and objectives and the LEA was able to successfully implement the IEP. Tr. 122-23.

34. On or about March 22, 2001, student's IEP team met and concluded that he required a reevaluation in preparation for his becoming eligible for kindergarten during the 2001-02 school year. Ex. R-9 at 99, 102; Tr. 631. The team prepared an evaluation plan, Ex. R-9 at 1010, and parent provided written consent for that reevaluation on or about March 26, 2001. Ex. R-9 at 103. At or around that time, the LEA also requested that the parents provide updated medical information regarding student as well as reports from the therapists who were providing services to student in the home. Tr. 632.

35. On or about May 1, 2001, student's multidisciplinary team convened to discuss the results of his reevaluation and to prepare a reevaluation report. Ex. R-10 at

107; Tr. 631, 685-86. The team also considered the medical and home therapist information that was received. Tr. 632-33. As a result of the reevaluation, the team concluded that student met the eligibility criteria to be diagnosed with multiple disabilities due to deficits in cognition, motor, language, and academic readiness. Ex. R-10 at 136; Tr. 631-33. That conclusion was based on the testing that showed that student's motor score was 59 months below his chronological age of 65 months, a cognitive score that was 61 months below that chronological age and other test instruments that were administered. Ex. R-10 at 136; see also Ex. R-10 at 138.

36. On or about May 7, 2001, the LEA provided the parents with notification of an IEP meeting scheduled for student on May 11, 2001. Ex. R-11 at 139.

37. On or about May 11, 2001, student's IEP team met to prepare an IEP based on the results of the reevaluation and in preparation for the 2001-02 school year. Ex. R-11 at 140; Tr. 634. At that meeting, the team was able to complete all of the IEP with the exception of the placement portion. Tr. 634-35. The IEP's present level of performance notes that student "is in good general health with a medical diagnosis of brain damage due to atrophic malformation". Ex. R-11 at 142. In addition, the present level notes that "student's significant disabilities cause great fluctuation in his abilities on a day to day basis, which will make it more difficult for him to follow a regular classroom routine and curriculum. He requires frequent change of body position, daily muscle and flexibility stretching, constant one to one assistance in small group or individual instruction, additional avenues to foster communication, and total support for self-help issues." Ex.

R-11 at 142. The present level also notes that one of student's strengths is his general good health. Ex. R-11 at 142. The team, including parent, agreed on the content of the present level of performance. Tr. 635.

38. The team also completed and agreed on goals and objectives in the areas of developmental skills, readiness, occupational and physical therapy, and speech-language. Ex. R-11 at 143-52; Tr. 635. Parent agreed with those goals and objectives. Tr. 129.

39. With respect to placement, the IEP notes that student was unable to participate in a regular education environment. Ex. R-11 at 154. In addition, the IEP notes that "student's motor, cognition, readiness and communication disabilities cause him to function within a 3 to 14 month developmental range . . . His significant disabilities require an individualized intensive program, offered 5 days a week, by trained specialists and therapists." Ex. R-11 at 154. The team also notes student's need for one-to-one and very small group instruction to allow him to develop skills "that are needed for maximum potential within his environment". Ex. R-11 at 165.

40. The team began its discussion of placement at the May 2001 meeting and started reviewing all placement options, including regular education. Tr. 636-39. Although parent began by suggesting that student spend some time in regular education in the elementary building because of his enjoyment of the other children, Ex. R-32 at 432, Tr. 637, the team ultimately agreed that a regular kindergarten classroom was not appropriate. Tr. 637, 700. The team, including parent, did agree that student needs therapies five days a week and a functional, rather than academic, curriculum. Tr. 638-39. At one point, the team began to discuss a placement at the SSH. At that meeting,

LEA staff explained that such a placement was necessary and appropriate for student because of the facilities, staff experience and flexibility that were available. Tr. 639-40. Parent expressed reservations, but not disagreement, with a state school placement. Tr. 152. However, because the parent had never visited the SSH in Columbia, Missouri, the Lea agreed to make arrangements for a visit before finalizing placement. Tr. 640. Parent was willing to make such a visit. Tr. 640.

41. The team, therefore, did not reach a decision with respect to student's placement for the 2001-02 school year at the May meeting. Tr. 635, 640. However, because student's previous IEP was scheduled to expire, the team completed an interim IEP for the few days remaining in the school year and for the summer of 2001, and agreed to reconvene to finalize a placement decision for the 2001-02 school year. Tr. 636; Ex. R-11 at 152, 157, 159.

42. Between the May 11, 2001 IEP meeting and a subsequent meeting held on June 5, 2001, the LEA arranged for a visit to the SSH. Tr. 641, 487. The special education teacher drove parent there. Tr. 641. The group met with the principal of the school and received a tour. During that time, they had an opportunity to ask questions and state any concerns. Tr. 641. The special education teacher did not recall the parents expressing any concerns. The special education teacher did not observe anything regarding the physical facility that caused her any concern regarding student's possible placement there. Tr. 690.

43. After the tour, parent informed the special education teacher that she would need to speak to her husband regarding a state school placement. Tr. 642. Accordingly, the special education teacher telephoned the parent several days later to discuss any questions regarding the state school and to schedule another meeting to determine placement. Tr. 642.

44. On or about May 31, 2001, the LEA provided the parents with a notification for an IEP meeting to be held June 5, 2001. Ex. R-12 at 159; Ex. R-14 at 180; Tr. 123-24.

45. On or about June 5, 2001, the team convened to complete the IEP that it began on May 11. Tr. 217; Ex. R-12 at 159; R-14 at 181; Tr. 124. The present level and goals and objectives remained the same as those that had been completed and agreed to at the May meeting. Ex. R-14 at 186-93; Tr. 127, 296-97; 643. The team agreed that student required each of his therapies for five days a week for 30 minutes a session and special education for 270 minutes per day for five days a week. Ex. R-14 at 194; Tr. 643-44. Parent agreed with the need for those services. Tr. 643. The team further discussed student's ability to tolerate a five day a week, full day schedule and determined that, because of the flexibility available at SSH, student would be able to tolerate that school day. Tr. 217, 644. After discussion, the team concluded that student should be placed at SSH for the 2001-02 school year on the basis that the placement would "allow him to develop, practice and master developmental, functional, and self-help skills that are needed for maximum potential within his environment." Ex. R-14 at 194; Tr. 645.

Parent indicated that the family would not legally disagree with the team's decision, but would simply provide home schooling to student. Tr. 645.

46. On or about June 8, 2001 the LEA provided the parents with a written notice of action formalizing the state school placement decision. Ex. R-12 at 159; R-15 at 201.

47. On or about June 6, 2001, the LEA received correspondence from Lisa Turner, an employee of DESE, in which Ms. Turner informed the LEA of the requirements for a referral to the state schools for the severely handicapped. Ex. R-16 at 202; Tr. 242-43.

48. Subsequent to June 6, 2001, the LEA prepared, as part of that referral, a justification for separate school placement. Ex. R-16 at 203-06; Tr. 243. The special education teacher prepared the justification. Tr. 655.

49. The justification for separate school placement that the LEA provided as part of its referral notes that "Student is functioning within a 3 to 14 month developmental range and testing shows that he is severely to profoundly mentally retarded. He needs a functional curriculum, that will allow him to develop, practice, and master skills that are needed for maximum potential within his environment. This requires an educational setting that provides intensive one to one instruction by specially trained specialists and therapists." Ex. R-16 at 204; see also Tr. 244, 655. The justification further notes that student needs a

daily consistent schedule of stretching, inhibitory techniques, and range of motion are mandatory in order for student to access this environment with greater ease and more consistency Because of the specialized manipulation and functional curriculum needed by student, his learning environment is tremendously different from the other students in the class. Opening, readiness activities, lessons, stories, recess, special activities, and sharing experiences are

not relevant to student's education. He would have **no meaningful participation** in its programs. Because of his limitations he needs extended time, additional space and frequent repositioning. His carefully followed educational routine would cause additional confusion and disruption to the classroom. In addition, his adaptive equipment, materials, and toys would be an enormous intrusion causing additional noise, more distractions, and continuous interruption to the learning environment of the other students.

Ex. R-16 at 204 (emphasis added).

50. Moreover, the justification notes the LEA anticipated no or only limited benefits for student in the LEA's programs and informed the State that the LEA operated no program for severely handicapped students. Ex. R-16 at 205. Therefore, in the LEA's opinion, "placing student in the local education setting would be a great disservice to student and this would not be the least restrictive environment for him." Ex. R-16 at 205; Tr. 655-57.

51. On or about July 6, 2001, Lisa Turner informed the LEA that student was eligible for placement at the SSH based on DESE's review of the information provided by the LEA. Ex. R-18 at 210; Tr. 249. Student was assigned to attend the SSH in Columbia, Missouri. Ex. R-18 at 210-12.

52. At hearing Petitioner called Lisa Turner to testify. Tr. 232. At the relevant time, Ms. Turner was employed by the Missouri Department of Elementary and Secondary Education as the director for administrative services for the SSH. Tr. 232-33. In that capacity, Ms. Turner supervised the individual who determined eligibility for those state schools. Tr. 233. At hearing, Ms. Turner described the process for referral to the state schools. Tr. 232. If a district has a student that it is unable to serve, the district

submits documents to the state schools for an eligibility review. As part of that process, the district submits the student's diagnostic evaluation, any IEPs, progress information, and a justification for placement in a separate school. Tr. 234-38. That information is reviewed by the state school personnel and the district is informed with regard to the student's eligibility. If the student's IEP team concludes that the state schools constitute the least restrictive environment for that student, the district can refer the student for placement. Tr. 235.

53. Per Ms. Turner's testimony, a student may be deemed eligible for the state schools for the severely handicapped under two sets of criteria. Tr. 238. If a student can be evaluated using standardized measures, the student must be performing at a level of four standard deviations below the mean in cognition and must have comparable adaptive behavior deficits. Tr. 238. If the student cannot be so evaluated, the diagnostic information presented must show that the student has significant deficits in intellectual and adaptive skills and must require pervasive supports across all life areas. Tr. 239. If the student does not satisfy one of the two sets of criteria, the student would not be eligible for state school placement. Tr. 239-42; see also Petitioner's Exhibit PP.

54. Ms. Turner testified that the justification for placement and other documentation submitted by the LEA with respect to student's eligibility indicated student was determined eligible under the second set of criteria. Tr. 244. Ms. Turner personally reviewed the materials submitted. Tr. 253. In Ms. Turner's opinion, there was no question that student met the eligibility criteria. Tr. 253. When making that

determination, Ms. Turner reviewed all material submitted, not just one statement taken out of context. Tr. 256. Moreover, in her opinion, the LEA followed all proper procedures with respect to student's referral and eligibility determination. Tr. 253-54. The Panel finds that Ms. Turner's testimony was credible.

55. On or about July 11, 2001, the parents filed a first request for due process to challenge the team's proposed placement at SSH. Ex. R-31 at 405-09; Tr. 172. In that request, the parents indicated that student had made progress in the ECSE program and that they wanted him to continue to be placed in the LEA. Ex. R-31 at 409.

56. As a result of the due process filing, student's placement continued in the ECSE program at the School House pursuant to IDEA's stay-put provision. Tr. 169, 210; 645; see also Ex. R-31 at 422.

57. A hearing was scheduled regarding the parents' first due process request for January 14-15, 2002. Ex. R-31 at 426.

58. Student returned to the ECSE program in the School House in August for the beginning of the 2001-02 school year. Tr. 645.

59. On or about October 9, 2001, student had surgery to replace his hipbones in their sockets. Ex. R-34 at 437; Tr. 161, 170.

60. On or about October 15, 2001, Dr. Greene, student's surgeon, released him to resume his occupational and speech therapies. Ex. R-33 at 436.

61. On or about October 31, 2001, student's IEP team reconvened to discuss whether student's placement should be changed to homebound because of the surgery. Ex. R-34 at 437; Tr. 646. Parent attended that meeting. Ex. R-34 at 440; Tr. 647. At the

meeting, District personnel offered homebound as an option, even though student's stay-put placement of ECSE remained in place. Tr. 170-71, 659-60. However, parent indicated that homebound was not necessary because she anticipated that student's cast would be removed on November 7 and he could return to school after that. Tr. 646, 659; Ex. R-34 at 437. Because of the pending due process, the team did not further discuss placement at the state schools. Tr. 647.

62. After student's cast was removed on or about November 7, 2001, the parents attempted to return student to the ECSE program. However, he was unable to fit in his wheelchair and the parents ceased sending him to the District's program. Tr. 646-49.

63. On or about December 11, 2001, the parents withdrew their July 11, 2001 request for due process. Ex. R-31 at 431. At that time, IDEA's stay-put placement at ECSE concluded and the proposed state school placement became operative. Tr. 111, 176, 653.

64. On or about December 19, 2001, student's IEP team convened at the parents request. Ex. R-35 at 441; Tr. 177, 649. At the time the LEA scheduled the meeting, the LEA was unaware of why the parents called the meeting. Tr. 649. At the meeting, the parents reported that student's health had declined and they no longer believed that he was capable of attending the School House. Tr. 177, 650. They, therefore, requested a homebound placement. Tr. 650; Ex. R-35 at 441. In addition, the parents informed the team that they had physicians orders indicating that the proposed state school was not appropriate. Ex. R-35 at 441. In response, LEA staff indicated that they would need

current medical information from student's doctors as well as an opportunity to speak to those doctors before a decision regarding the parents' request could be made. Ex. R-35 at 441; Tr. 177, 650. The parents indicated that they would provide a release allowing for such information, but also indicated that they would need to be present during conversations with the physicians. Tr. 650. The LEA further indicated that it could not make a new placement decision without such information, but would reconvene the team after an opportunity to consider current medical information. Tr. 651; Ex. R-35 at 441.

65. After the meeting, the District did receive some medical information. Ex. R-33 at 434; 46 at 547.

66. On or about January 24, 2002, Dr. Robert J. Harris prepared correspondence addressed "to whom it may concern". Ex. R-36 at 443; Tr. 179; Harris Depo. at 19. The letter, prepared at the parents' request, was the first such letter that the parents had requested Dr. Harris write on student's behalf. Harris Depo. at 39. The letter was provided to student's IEP team at an IEP meeting on or about January 30, 2002. Tr. 179, 664; Ex. R-37 at 445. In that letter, Dr. Harris indicated that student had been his patient for the preceding two years and, in Dr. Harris' opinion, students physical limitations made him susceptible to respiratory infections. Ex. R-35 at 443. Dr. Harris recommended a decrease in students contact with large groups of children and a homebound placement. Ex. R-36 at 443; Harris Depo. at 19-20.

67. Dr. Harris testified by videotaped deposition at hearing over Respondent's objection. Tr. 38, 43. At the time of his deposition, Dr. Harris had been student's primary physician and pediatrician for two years, beginning in June 2000, for acute care

of his illnesses. Harris Depo. at 3-4, 12-13, 24. At that time, Dr. Harris had imposed no restrictions on the parents with respect to taking student into the community for various activities, although he recommended that they generally limit his exposure to large numbers of children during the high incident season for respiratory infection. Harris Depo. at 29. Dr. Harris was unaware that student attended the LEA's ECSE program from ages 3 through 6. Harris Depo. at 31.

68. Dr. Harris saw student for approximately 30 minutes during the late morning the day prior to his deposition on September 27, 2002, when student was present at a sibling's appointment during the late morning. Harris Depo. at 1, 4, 23, 25. At that time, Dr. Harris conducted an incidental partial exam of student by evaluating his gross motor function and his interactions with his sibling, his mother and Dr. Harris. Harris Depo. at 4, 23, 25. At that time, student was in a special chair that is similar to a wheelchair and was seated in an upright position with support for his head and trunk. Harris Depo. at 26. Student appeared to be at ease and comfortable in the chair and did not have to be removed or repositioned in the chair during the appointment. Harris Depo. at 26. Moreover, Dr. Harris did not observe student to have any significant difficulties with secretions during that visit. Harris Depo. at 26-27. During his incidental examination, Dr. Harris observed that student's general health had improved, Harris Depo. at 27, 42, he did not appear fatigued, Harris Depo. at 42, he had greater movement of his upper extremities and he interacted somewhat by moving his head toward his sibling. Harris Depo. at 23-24, 43. During his deposition, Dr. Harris stated that he was unaware if

parent had just driven student to Columbia for the appointment. Harris Depo. at 25.

Moreover, Dr. Harris testified that he does not know how student is transported by the parents. Harris Depo at 25-26. In Dr. Harris' observations, he believes that student enjoys contact with other children. Harris Depo. at 24.

69. According to Dr. Harris, student has a brain injury and has had hydrocephalous that necessitated placement of a shunt. Harris Depo. at 6, 7. As a result of the brain injury, student has severe spasticity of all of his muscles, a severe communication problem, a growth hormone deficiency and some difficulties swallowing secretions. Harris Depo. at 6, 32-33. Because of his inability to handle secretions, he has had pneumonia and is more susceptible to respiratory infection. Harris Depo. at 6-9. In addition, student has had some seizures, although those had not been a recent medical problem. Harris Depo. at 7. Student has had orthopedic consultation and surgery to assist with his motor function and that area of his care is managed by Dr. Wright. Harris Depo. at 7.

70. Prior to the appointment the day before Dr. Harris' deposition on September 27, 2002, Harris Depo. at 1, the last time that Dr. Harris saw student for a physician's appointment was January 28, 2002. Harris Depo. at 27. Prior to that, Dr. Harris saw student on September 18, 2001. Harris Depo. at 27. An associate of Dr. Harris' saw student on December 24, 2001 for pneumonia that did not require hospitalization. Harris Depo. at 28. Student had one prior bout of pneumonia in mid-June 2000 that also did not require hospitalization. Harris Dep. at 4, 29.

71. In Dr. Harris' opinion, student is considered medically fragile, Harris Depo. at 15. Dr. Harris believes that student is medically fragile because he is more susceptible to life threatening illness such as pneumonia because of his physical handicaps. Harris Depo. at 35. Because of his conditions, Dr. Harris' believes that a bus ride of 30-45 minutes each way to and from SSH in Columbia, Missouri would be detrimental to student's medical condition. Harris Depo. at 15-16, 17-18. More specifically, Dr. Harris testified that such a ride would increase student's fatigue and reduce his endurance. Harris Depo. at 17-18. However, Dr. Harris had no opinion as to whether such a bus ride would have an effect on student's muscle tone. Harris Depo. at 18. Because of the effects of the bus ride, Dr. Harris believes that student would be less likely to learn. Harris Depo. at 19. However, Dr. Harris has never had an opportunity to directly assess the effects of a 30-45 minute ride with student. Harris Depo. at 42. In addition, in Dr. Harris' opinion, it would be detrimental for student to be placed in a classroom with 4-5 students. Harris Depo. at 16. In Dr. Harris' opinion, student should receive his various therapies in short, separate sessions rather than on a prolonged continuous basis. Harris Depo. at 35. In addition, his therapy should be provided when student is at his best in terms of fatigue and endurance. Harris Depo. at 44-45.

72. On or about January 25, 2002, Dr. Wright corresponded with the LEA. Ex. R-36 at 444; see also Tr. 652. In that correspondence, Dr. Wright indicated that he was student's pediatric physiatrist who followed student's musculoskeletal abnormalities and physical limitations. Ex. R-36 at 444. The correspondence states that "(f)rom a physical

tolerance perspective, a bus ride surpassing 30-45 minutes both ways becomes a significant challenge to student's endurance . . . As a result, if student is not able to be schooled in his own district, then homebound schooling would be an appropriate alternative . . ." Id.; see also Tr. 183-84 (emphasis added).

73. On or about March 14, 2002, student's IEP team met to consider the State School placement, the parents' request for homebound and the information obtained from Dr. Wright. Ex. R-42 at 459; Tr. 652-53, 667-68, 691. Parents did not attend, although they had been provided with two prior invitations. Ex. R-42 at 459, Tr. 653-54. At that meeting, the individuals who attended the meeting with Dr. Wright on February 14 related the information received from him. Tr. 654, 667. More specifically, those individuals reported that Dr. Wright indicated that he had placed no restrictions on the family with regard to student and that he was 85% recovered from his October surgery. Ex. R-42 at 459. The individuals also reported that Dr. Wright had not asked the parents about student's rides in the family car and indicated that he had not observed student on a bus. Ex. R-42 at 549. Dr. Wright agreed that, in his opinion, SSH was the perfect placement for student, but for the bus ride. Ex. R-42 at 459. Dr. Wright's primary concern, as reported to the team, was student's endurance. Ex. R-42 at 459. When Dr. Wright was asked by District personnel about student's swallowing issues, Dr. Wright responded that he was not at liberty to discuss the topic. Ex. R-42 at 459-60.

74. In addition to relating the information from Dr. Wright, the IEP team considered all medical information acquired on student to that point in time. Tr. 669. The team also considered information acquired from the SSH that indicated that the

school bus would arrive to pick up student at his home from 8:10 to 8:20 a.m. and arrive at SSH around 8:45 a.m. In the afternoon, the state school information showed a similar length in student's bus ride. Ex. R-42 at 459. The length of student's ride was noted to be less than the state school average of 65 minutes one way. Ex. R-42 at 459.

75. Based on all the information considered, the team concluded that the bus ride to SSH would not be harmful to student. Tr. 692. That decision was based, in part, on staff observations of student in school after similar rides to and from doctors' appointments in Columbia as well as the staff's belief that any tone or fatigue issues that might result from the bus ride could be accommodated by SSH's ability to flexibly schedule. Tr. 693. Moreover, staff believes that the issues raised by Dr. Wright were issues with which staff had successfully dealt in the ECSE program for three years. Tr. 654, 669-71. As a result, the team decided to reaffirm the placement at SSH and deny the parents' request for homebound. Tr. 669, 694.

76. On or about March 14, 2002, the District provided the parents with a written notice of action refused, in which the parental request for homebound was denied. Ex. R-50 at 570. The parents' request was denied because "student's disabilities, while severe, do not warrant such restrictive placement. Student's significant disabilities are not due to severe illness, do not present a condition of medical fragility . . . The team has considered Dr. Wright's recommendations regarding transportation and does not believe that an approximate one-way bus ride of 30-45 minutes would be detrimental." Ex. R-50 at 570.

Rationale

1. The implementing regulations of the IDEA recognize State Education Agencies as “public agencies” which are entitled to provide education to children with disabilities. (34 C.F.R. 300.22)
2. The implementing regulations of the IDEA set forth at 34 C.F.R. under Section 300.370(a)(1) and (b)(1) specifically authorize state education agencies to directly provide special education services to children with disabilities, either “directly, by contract, or through other arrangements”.
3. Missouri State law defines “severely handicapped children” at 162.675 (3) R.S.Mo. as “handicapped children under the age of twenty-one years who, because of the extent of the handicapping condition or conditions, as determined by competent professional evaluation, are unable to benefit from or meaningfully participate in programs in the public schools for handicapped children. The term “severely handicapped” is not confined to a separate and specific category but pertains to the degree of disability which permeates a variety of handicapping conditions and education programs”.
4. Missouri State law at 162.725 R.S.Mo. requires the state to provide special education services for all severely handicapped children residing in the school districts that are not included in special school districts.
5. The Petitioner in this case is a student who resides in the Centralia Public School District.

6. The Centralia Public School District is not included in a special school district.
7. Missouri regulations implementing Part B of the Individuals With Disability Education Act at Section IX contains procedures for local education agencies which do not operate such programs themselves and which are not a part of a special school district to refer to the State Education Agency to receive direct services from the SEA, either directly at a state school, by an approved private agency, or via homebound services.
8. On July 6, 2001 the student in this case was determined by the SEA to be eligible to receive services directly from the SEA.

Decision

1. Since at least July 6, 2001 the student in this case has met the State's statutory definition of a "severely handicapped child".
2. As specifically allowed under the IDEA, and as specifically required under Missouri State law, the Missouri Department of Elementary and Secondary Education is currently, and has been since at least July 6, 2001, the public agency responsible for the provision of special education and related services to the student.

A recent holding by the U.S. District Court for the Western District of Missouri, Southern Division in the case of Missouri Department of Elementary and Secondary Education, et al., vs. Springfield R-12 School District, et al., No. 01-3311-CV-W-SOW based upon R.S.Mo. Section 162.675 is consistent with this finding.

3. Petitioner's allegation that the Centralia Public School's referral to the SEA was "improper and illegal" was refuted by the evidence in this case, including the

testimony of the Petitioner’s own witness, Lisa Turner. The panel finds that the term “mental retardation” was inadvertently included in the boiler plate exclusionary clause found in the last sentence of Respondent’s Exhibit 10, pg. 136.

4. Petitioner’s remaining issues, under 6(a), (c), (d), on Pages 2-3 of their Amended Complaint and Request for Hearing are mooted by the Panel’s finding that the student was appropriately referred to, and found eligible for, direct services by the SEA.

The LEA has provided FAPE to the student under its early childhood special education program but, the student is unable to benefit from or meaningfully participate in either the LEA’s special education program or general education program. Issues concerning the student’s placement should now be raised with the SEA.

Conflicting evidence has been presented concerning the student’s present physical condition and, the effect of the student’s condition on his ability to tolerate bus transportation. These issues should be raised with the SEA under the procedures provided in the state plan.

Appeal Procedure

Either party has the right to appeal this decision within 30 days to a State Court of competent jurisdiction pursuant to Chapter 536 of the Revised Statutes of Missouri, or to a Federal Court.

Panel Members Supporting Decision

Patrick O. Boyle

Rand Hodgson

George Wilson

Panel Members Opposing Decision
